

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: :

ACE SECURITIES CORP. HOME EQUITY : Docket #13cv01869
LOAN TRUST, SERIES 2007-HE3, 1:13cv-01836-AJN-GWG
:

Plaintiffs, :

- against - :

DB STRUCTURED PRODUCTS, INC. New York, New York
: July 8, 2015

Defendants. :

-----:

PROCEEDINGS BEFORE
THE HONORABLE GABRIEL W. GORENSTEIN,
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

APPEARANCES:

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None

E X H I B I T S

<u>Exhibit Number</u>	<u>Description</u>	<u>ID</u>	<u>In</u>	<u>Voir Dire</u>
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THE CLERK: The case of In re Ace Securities Corporation, Docket 13cv1869. Counsels, please state your appearances.

MR. MICHAEL SHUSTER: Michael Shuster for the plaintiff.

MR. DWIGHT HEALY: Dwight Healy for the plaintiff.

MR. BRENDON DeMAY: Brendon DeMay for the plaintiff.

MR. (inaudible): (inaudible) for the plaintiff.

MR. DAVID WOLL: Oh, I'm sorry, jumped the gun. Good afternoon, Your Honor, David Woll for the defendant.

MR. CHRISTOPHER HULTMAN: Chris Hultman for the defendant.

MR. DAVID GALLO: David Gallo for defendant.

HONORABLE GABRIEL W. GORENSTEIN (THE COURT):
Okay, welcome everyone. We're here based on a joint letter dated June 24th. You can be seated if you're not speaking. I think the simple thing is to go through the issues. I did read the letter. It's probably going to help to read again what's going on.

As to the first issue, I couldn't tell what was going on. Is this just a dispute about dates and whether July 31st is okay. Or do you want me to order July 31st?

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Where are we on this, Mr. Shuster?

MR. SHUSTER: Well, Your Honor, the reason that we're requesting an order requiring the defendant to produce the material by July 31st is two-fold.

One, it's, frankly, material that should've been produced a long time ago. It is a substantial amount of very highly relevant material, and it is inexplicable to me why it wasn't produced earlier.

And second, in our initial discussions with my counterparts, they initially said they thought they would be able to complete their production of these materials in the middle of June. And that date has now obviously moved considerably. And given the importance of the volume of these documents we would just like to set a date certain by which they will be produced.

THE COURT: Okay. So it's not a question of scope; it's the date, right?

MR. SHUSTER: I don't believe it's a question of scope.

THE COURT: Okay. Well I think the explanation here was sufficient. I'll order them produced by July 31st. Can we go to issue number two?

MR. SHUSTER: Issue number two concerns -- so there are two affiliates of Deutsche Bank. One is called DB

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2 Home, formerly Chapel and the other, it's MortgageIT, and in
3 the last conference with Your Honor, it was established that
4 documents of those affiliates would be produced. We then
5 had meet-and-confers and have arrived at an impasse at a
6 date range for which searches should be conducted and
7 documents should be produced as to one of the two
8 affiliates, which is MortgageIT.

9 The defendant's position is that the cutoff date
10 should be February 2009, which is a date at which apparently
11 MortgageIT was merged into a Deutsche Bank; its operations
12 were merged into Deutsche Bank. We don't dispute that but
13 the same personnel who were at MortgageIT were now in within
14 the defendant and they continue to do work with respect to
15 MortgageIT.

16 And to the extent they have responsive documents
17 bearing on their work for MortgageIT that fall within the
18 search parameters, we think those documents should be
19 produced right up until the date of the complaint, which is
20 the same timeframe for which the other affiliates documents
21 are being produced, and for which the defendant's and the
22 plaintiff's documents are being produced.

23 THE COURT: I thought they said -- I'm not sure
24 why you're not addressing this. Maybe I'm misunderstanding.
25 I thought their point on this was that they'd ceased loan

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2 operations on the date that the --

3 MR. SHUSTER: Well they ceased loan --

4 THE COURT: If I can finish my sentences, Mr.
5 Shuster --

6 MR. SHUSTER: Oh, I'm sorry. I apologize.

7 THE COURT: -- we're on the record and we're
8 being recorded. If someone wants to order a transcript we
9 can't have two people talking at once.

10 They said that there -- they had ceased lending
11 operations on the date that they're proposing two months
12 earlier, and that the last loan they originated that was in
13 this action was two years earlier. So that to you is
14 irrelevant?

15 MR. SHUSTER: I'm sorry, Your Honor, I didn't
16 hear your --

17 THE COURT: That's irrelevant to you?

18 MR. SHUSTER: That the reason why they would
19 still have discoverable and potentially relevant documents
20 is they continued to monitor the loans. They continued to
21 monitor loan performance, information continued to come in
22 to them concerning the loans concerning potential breaches
23 on the loans, and the quality of the loans, the quality of
24 origination of the loans.

25 THE COURT: So their statement that they ceased

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lending operations, to your mind, doesn't include monitoring of loans?

MR. SHUSTER: It doesn't include monitoring of loans or generating or receiving information concerning potential defects in the loans or breaches of reps and warranties.

THE COURT: Mr. Woll?

MR. WOLL: Yes, Your Honor, thank you. So the -- what we're trying to do is we're trying to be practical here in terms of the information Your Honor just referred to and the fact that the search terms that we're agreeing to run up to February 2009, which as you pointed out, Your Honor, is the -- postdates the lending operations in any of the loans at issue and these securitizations.

The search terms include things like DBSP and Deutsche. And if we run those search terms on MortgageIT people who then became effectively employees of Deutsche Bank entities the numbers are just going to go through the roof. And it's going to go away from the original purpose of the --

THE COURT: Give me a second. I just suddenly got a leg cramp. I think I need to try walking it off for a second. It doesn't happen very often but when it does it's kind of painful.

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(Pause.)

THE COURT: Okay. I can now focus on what you're saying.

MR. WOLL: So we're already agreeing to run the search terms up to February 2009 which I believe hits on something like 200,000 documents. The --

THE COURT: We should focus on the goal here.

MR. WOLL: Yeah.

THE COURT: It sounds like the goal is to get documents from the MortgageIT people that relate to potential breaches of the loans at issue in this case. Is that right, first of all, Mr. Shuster?

MR. SHUSTER: Yes.

THE COURT: That's why we're doing this.

MR. DeMAY: That's why we're doing this.

THE COURT: So what's your suggestion for how to do this or do you think that there's no possibility they have such documents? Because Mr. Shuster certainly doesn't think that's the case.

MR. WOLL: Right.

THE COURT: Where's the disconnect?

MR. WOLL: Well, I think the -- let me address my suggestion based on what Mr. Shuster said before and the questions Your Honor asked. I mean, to the extent that the

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2 real goal is after MortgageIT's operations ceased in
3 connection with lending activities and, you know, the loans
4 at issue they want to get documents that monitored the
5 performance of those loans. I think, but would be happy to
6 confirm -- because we didn't specifically discuss this
7 before -- I think that is something that would be picked up
8 through discovery of DBSP, the defendant.

9 And what we're trying to avoid is running search
10 terms with Deutsche basically in the name that's going to
11 hit on, you know, basically every e-mail these people wrote
12 since it's in their signature block and their address field.

13 So I think the goal of the MortgageIT subpoena
14 originally was to get discovery from MortgageIT as a
15 nonparty originator in connection with the loans that
16 originated. And we certainly cover that period.

17 And for this monitoring tail, if you will, I guess
18 what I'd suggest is we confirm that to the extent monitoring
19 continued that that will be picked up through the -- or has
20 been picked up through the searches we've already run. And
21 that would avoid running Deutsche on all these people's e-
22 mails after they became, you know, Deutsche employees,
23 effectively.

24 THE COURT: Are you running Deutsch on other
25 people's dealing?

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MR. WOLL: But we're not running --

THE COURT: Is it that -- hold on. Is it that you are just trying a limited number of custodians you're running Deutsch on?

MR. WOLL: For purposes of MortgageIT, yeah, we're trying to limit the date range where we continue to run Deutsche as effectively as a counterparty to MortgageIT as an originator. So what we are doing for the MortgageIT and for Chapel is up until a certain date we're running Deutsche. But on the DBSP documents themselves we're not running the term DBSP because that would, you know, generate --

THE COURT: So, okay. So I guess I understand the following concept which is that if you're trying to figure out what the e-mails are that have to do with them honoring this loan it's crazy to start running Deutsche once they've become part of Deutsche. But then it seems to me you should come up with some other suggestion for how to get at these. It's your responsibility to conduct a reasonable search, obviously, of these custodians for this. So it seems to me you need to come up with a plan, no?

MR. WOLL: Right. And we, I agree, Your Honor, and we had proposed that we run the loan terms, the loan IDs, and the securitization terms which should pick up any

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monitoring documents to the extent they're not already being picked up through the DBSP searches. And that's something that we're prepared to do for the MortgageIT custodians up to the date of the complaint.

THE COURT: I mean, you know, my view of the big picture of all this is that it's the custodian's or the document producer's responsibility to answer the document requests and to do a reasonable effort to find them. In the old days, that reasonable effort had to do with pawing through filing cabinets; now it has to do with search terms.

You know, in the old days, if you didn't come up with a document and it turned out you hadn't done a good job going through the filing cabinets, you got in a lot of trouble. And I suppose you can get in trouble now for the search terms. What's different now is people are finding out the search terms in advance and I think that's good. But it now puts a responsibility as well on the plaintiff if they want it, to say why -- what they're proposing is unreasonable. So I guess I'd turn back to you, Mr. Shuster.

MR. SHUSTER: Well, the I mean, the search terms here across the board have been pretty heavily negotiated. And the search terms that the defendant would be running for the MortgageIT custodians for the period after February '09 are not different from ones they're running for other

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2 custodians. They're not just running DB; there's always
3 connectors and qualifiers to insure that we're not picking
4 up every document that says DB, or Deutsche Bank.

5 THE COURT: I assume you're willing to do on
6 these people what you're doing for other Deutsche Bank
7 custodians or not?

8 MR. WOLL: Your Honor, we are, except that the
9 reference to the DB terms or the Deutsche Bank or DBSP
10 terms, I don't believe we're running DBSP within X for the
11 DBSP custodians. Because again, that's going to bring back
12 to my --

13 THE COURT: I know. My question is this: I
14 thought I just heard, and maybe I misheard, Mr. Shuster's
15 saying you should at least do for these people what you're
16 doing for the other Deutsche Bank people in terms of trying
17 to find this. So what's, you know, I don't know enough
18 about this. Usually parties could get this kind of level of
19 detail out. But if you can't, I'll get involved.

20 So is there something that you're doing for other
21 Deutsche Bank people or DBSP people that you're not doing
22 for this unit?

23 MR. WOLL: I think the only exception is the
24 Deutsche Bank terms with connectors after a certain date.
25 We're proposing the --

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THE COURT: You're, I mean, you're actually, I mean, it just seems weird, unless I'm misunderstanding you, that you're telling me, oh, it's fine to do it, to do those kinds of searches for the DBS people but we don't want to do it for the MortgageIT people who became part of DBSP. Am I misunderstanding you?

MR. WOLL: I think you are, Your Honor, and I apologize. I'm probably not being very clear.

THE COURT: Probably my fault. Go ahead.

MR. WOLL: I don't believe we are running, and counsel will correct me if I'm wrong, I don't think we are running DBSP within, you know, five words of X for DBSP. So because this was MortgageIT as a counterparty we undertook to do that. And all we're trying to do is have a rational cutoff date for that once MortgageIT stops operations and became affiliated with Deutsche Bank. And --

THE COURT: Well, I think it's perfectly rational to stop the DB-type search once they become part of Deutsche Bank. That makes complete sense. But as I say, then you need something, if you don't already have it, that's going to allow you to come up with the documents that we care about, which are these monitoring documents.

MR. WOLL: Right, and that, Your Honor, I would propose -- I'd be happy to -- we had proposed this before.

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2 I'd be happy to discuss it further with counsel but I think
3 if we run the loan-specific terms and the securitization
4 terms. that will identify the loans, it's like 85 or so
5 MortgageIT loans. And to the extent they were monitored I
6 think we'll come up with those documents, so.

7 THE COURT: Mr. Shuster?

8 MR. SHUSTER: Yeah, Your Honor, on this issue the
9 real question I think is the cutoff date. The last --

10 THE COURT: Okay. When you say the cutoff date
11 you mean the cutoff date in which you want them to actually
12 run Deutsche Bank, DB-type terms?

13 MR. SHUSTER: The -- to run the entire range of
14 search terms --

15 THE COURT: Right. Their problem is that is they
16 say it's crazy to run those terms when they're now a part of
17 Deutsche Bank and I agree with them. So having heard that,
18 do you think you guys can work this out? In other words, I
19 want you to get your documents but I understand why it's
20 crazy to do this once they're part of Deutsche Bank. It's
21 going to turn up too much if it's part of their signature
22 line.

23 MR. SHUSTER: As long as we can get -- as long as
24 it's clear that they have to search for the same period of
25 time that they searched for, the other Deutsche Bank

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2 affiliate, which is DB home and for Deutsche Bank's
3 structured products itself perhaps we can work it out we can
4 certainly try --

5 THE COURT: Okay. This is not a time issue; this
6 is a search-term issues from your point of view, right?

7 MR. WOLL: That's correct, Your Honor.

8 THE COURT: So, yeah, the time it seems obvious
9 that if there's any possibilities people are still
10 monitoring these loans, it should be searched for. So
11 that's the end of that. And the question is what are the
12 right search terms? And I don't have enough between the two
13 of you and this piece of paper to figure it out. So take
14 another crack at it and if you can't solve it, you give me
15 your search terms, and you give me yours, and I guess I'll
16 pick. I don't know what else to do.

17 MR. WOLL: Thank you, Your Honor.

18 MR. SHUSTER: So Your Honor, the third issue that
19 we have also goes to search terms. And if the Court wishes
20 we can attempt to do the same thing Your Honor just
21 described and then -- but where we landed on this one was
22 that we had an agreement and an understanding that the
23 defendants would run for their affiliates, which are DB home
24 and MortgageIT, a terms that is described in the third line
25 of our section which is --

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THE COURT: I see it, DB not within two of home.

MR. SHUSTER: Okay. So after really some months defendants came back to us and said due to an issue with their document vendor they can't run that term and they're not proposing to run any sort of equivalent term. They haven't proposed an alternative and they say if they run a more -- a less limited term they're come up with a higher volume of documents.

And our response to that is, if your vendor is unable even to run the term that we agreed, then either they should solve that problem, which vendors can usually do, or you have to deal with a larger volume of documents that would be uncovered pursuant to a more expansive search term.

But we think we're entitled to a search for the subject matter that would be covered by the string of search terms starting with DB not within two home.

THE COURT: Okay. I don't know, again, I have to look at this from the perspective of what documents you're hoping to get out of this search term and if you can't do it with this one, what are you doing that's reasonable -- I'm now turning to Mr. Woll -- what are you doing that's reasonable to try to get at the documents if you can't use the search term?

MR. WOLL: The only search term where we're

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2 saying we do not want to run the Chapel MortgageIT documents
3 are is just basically the letters DB within X of certain
4 other keywords. And the original proposal which we said we
5 would agree to, subject to confirming that it didn't bring
6 back too many search terms, was DB but not home. And the
7 reason for that -- and I apologize for burdening the Court
8 with this -- but DB home became the name of the business
9 line that Chapel and then at some point MortgageIT were
10 operating under.

11 So that's why the plaintiff proposed and we agreed
12 if we can do DB but not home then that might make sense, but
13 --

14 THE COURT: DB but not within two of home.

15 MR. WOLL: Right.

16 THE COURT: And what are you trying to get at
17 with -- what are you -- what's the big picture? What
18 documents are you trying to get at?

19 MR. WOLL: I think the -- I mean, we will get at
20 the documents because we're still searching for Deutsche and
21 DBSP, we're just saying that DB brings back hundreds of
22 thousands and documents above and beyond what we would
23 otherwise need to review. And we don't need that term.

24 THE COURT: Because why? What kind of DB is
25 something -- what is DB that it keeps showing up?

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2 MR. WOLL: Oh, why does that? I don't
3 specifically know. I know we ran the test but exactly why
4 that comes up versus others, I'm not sure. So again, we're
5 trying to put some rational limit on it but -- and we will
6 run terms that get at Deutsche and DBSP. But the DB term
7 just doesn't work.

8 THE COURT: And the reason your vendor can't run
9 this, do you know, understand it?

10 MR. WOLL: Beyond knowing that record told us
11 they don't have that capability, I don't have more
12 information on that. But I mean, Mr. Shuster seems to think
13 that we could convince the vendor do fix it. And, you know,
14 we have asked the vendor and it's told us no. I'd be happy
15 to ask again, but I think the answer's now because with --

16 THE COURT: Maybe it would be helpful for their
17 IT person to talk on the phone with you guys and the other
18 IT person so that they can maybe be convinced of why this is
19 a real problem. And then if not, I guess someone comes back
20 to me. The fact the people parties agree on terms, to me is
21 not the be-all and end-all of everything, if other issues
22 arise that become problems.

23 So I don't want to stand on ceremony. Again, my
24 goal is to try to get at documents that are responsive to
25 the document request and relevant to the case. And if you

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2 can come up with a reasonable way to do it, even if it's not
3 part of the (indiscernible) protocol, that's not going to be
4 a problem for me. I don't want you to be put to an undue
5 burden of 200,000 documents have failed and maybe 5 percent
6 of those.

7 So I don't know -- I don't know where to leave
8 this, Mr. Shuster. You know, I can haul in the IT people,
9 we can have a hearing. I mean, what do you want me to do?

10 MR. SHUSTER: No, I'm not asking the Court to do
11 that. But even without the DB not within two home
12 limitation, the search term is DB -- would be DB home within
13 25 of words like craft, junk, garbage, that kind of stuff.
14 It's search terms that are being run elsewhere in this case.
15 It's certainly in other RMBS case like this. And that we
16 know will turn up the responsive and relevant documents.

17 So if there's a large volume of those documents
18 it's because there's a large volume of documents that are
19 using language like that within 25 words of the phrase DB
20 home. Again, with these --

21 THE COURT: Is that what the 125,000 and the
22 110,000 is?

23 MR. SHUSTER: Those are -- those are the
24 defendant's numbers, but I guess --

25 THE COURT: No, is that running the terms like

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garbage and so forth?

MR. SHUSTER: Yes, I believe so.

THE COURT: And the problem? Well, let me just make sure. And the problem with those documents is that they're not -- they're both DB and non-DB?

MR. WOLL: Your Honor, first of all, I got clarification from my colleague about what the DB problem is. And that is because the e-mail addresses are DB.com. So that's why we get a lot more e-mails when we use DB. And it's not DB within garbage only. It's DB within purchased, DB within fall, DB within drop. It's a lot of different terms.

We ran the test to see how many additional terms we'd get if we did DB versus running Deutsche or DBSP and that's where we came up with the 125,000. We haven't reviewed the 125 so I can't tell you that, you know, exactly what's in those documents. But again, we think if we can, you know, limit it to Deutsche or DBSP or if the IT people can figure out how to do it, you know, without home --

THE COURT: Why don't the two of you IT people either get in a room or on the phone and talk this thing out and see if you can figure out a way to get what they want? And then if you can't, come back to me. And when you come back to me I need, I'm going to need, extreme detail. I

1 22

2 don't know what else to do.

3 All right. Mr. Shuster, you're done with that
4 one?

5 MR. SHUSTER: Yes, Your Honor, thank you.

6 THE COURT: Number 4 is going to have to be
7 briefed so what's your proposal?

8 MR. SHUSTER: Okay. Well what I wanted to do on
9 number 4 was actually provide -- show Your Honor some
10 documents to show that the activities over which the
11 defendant now want so place the cloak of privilege and work
12 product were activities that were ongoing well before breach
13 notices were sent to the defendant in this case, or others.
14 It was a business function. It started at least the
15 beginning of 2008 if not in 2007 but only business people
16 were involved and, you know, I think under the case law it's
17 not privileged or work product material. So that's the
18 argument I was going to make.

19 If it needs to be briefed, then I'll make the
20 argument in the briefing.

21 THE COURT: Great. When can you file it?

22 MR. WOLL: I guess we're going to, since our
23 motion to compel, we'll file it --

24 THE COURT: I mean if you want I could -- it's
25 their burden so it's kind of a weird situation. But since

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2 you have a lot of information that might --

3 MR. SHUSTER: Yeah, no, we'll file. We'll file.

4 I don't think we need 30 days. Let's get a move on. Can we

5 commit to like, what's today? Wednesday --

6 THE COURT: July 8th.

7 MR. SHUSTER: July 8th so Friday would be the

8 10th. So can't we say Friday the 24th, Monday the 27th?

9 Okay. Monday the 27th.

10 THE COURT: The 27th. Okay. That's two days shy

11 of three weeks. I assume we'll have to give you, Mr. Woll,

12 the same amount of time?

13 MR. WOLL: Yes, Your Honor, I did have an

14 additional thought about the schedule.

15 THE COURT: Okay.

16 MR. WOLL: And that is, there are a lot of

17 privilege issues that I think go both ways here. Because

18 HSBC is withheld a number of documents on the same or

19 similar grounds in terms of evaluation of repurchased

20 demands. And so I'm happy to, you know, do it one other

21 time or it might make sense to --

22 THE COURT: No, do it all at once.

23 MR. WOLL: Yeah.

24 THE COURT: Pre-motion conference waived. The

25 same schedule for you. You can file your motion July 27th.

1 24

2 Sound good?

3 MR. WOLL: Yes, Your Honor, and then we'll
4 respond to each other and then three weeks thereafter?

5 MR. SHUSTER: Two weeks, three weeks.

6 THE COURT: Three weeks less two days. I think
7 that's what I figured out. The 27th, Monday, so that means
8 you get the advantage of filing on a Friday and then the
9 weekend. August 14th for the opposition. What do you think
10 for reply? A week or more than a week?

11 MR. SHUSTER: A week is fine, ten days.

12 MR. WOLL: Maybe, how about --

13 THE COURT: Just three weeks.

14 MR. SHUSTER: Ten days?

15 MR. WOLL: I was going to say ten days, yeah.

16 THE COURT: Okay. That takes us to the 24th,
17 that's what you want?

18 MR. SHUSTER: Yes.

19 THE COURT: Okay. July 27, August 14, August
20 24th. Okay. Now the party opposing the motion to compel,
21 you know, has the burden. It has sometimes happened in the
22 past that replies are requested. If so, why don't you just
23 try to agree on it and maybe just send a letter or whatever
24 you have to do. I won't object as long as you're both
25 agreeing, okay?

1 25

2 MR. SHUSTER: Your Honor, while we're -- before
3 we move on to issue number 5, in connection with issue
4 number 1 we ask the Court to issue an order requiring
5 production of the materials by July 31. And then setting a
6 conference for two weeks after completion of that so that we
7 could reset some of the dates of the case schedule.

8 THE COURT: Why don't you just write a joint
9 letter if you can't agree computing letters, okay?

10 MR. WOLL: Okay.

11 THE COURT: If you ever need a conference, let's
12 do it. But if it's just scheduling then I'd rather have the
13 parties --

14 MR. SHUSTER: I do think we'll be able to work
15 that out, actually, optimistic. Issue number 5, this is --

16 THE COURT: Okay. Let me give you my big picture
17 on this, okay? I think we need to distinguish to some
18 degree between true affirmative defenses and regular old
19 defenses. And included in the regular defenses are things
20 like the plaintiff is not going to be able to prove its
21 case.

22 And I would include in that things like, oh, we
23 the defendants didn't cause this problem; some other person
24 caused this problem. That's not an affirmative defense.
25 That's saying when it comes down to the causation element or

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2 whatever the cause of action is, you're not going to show
3 that we caused this problem. Or defense, like the
4 plaintiff, is in its own material breach. Well you can only
5 collect on a breach of contract claim if you substantially
6 performed. So it's not that the defendant has an
7 affirmative burden to prove that the plaintiff failed
8 perform. The plaintiff has the burden of proving
9 performance, okay?

10 So there are some people out there that call these
11 negative defenses because all they're doing is saying,
12 plaintiff, you're not going to be able to prove, you know,
13 the elements of your claims here.

14 When it comes to true affirmative defenses, like
15 statute of limitations, maybe something like mitigating
16 damages, but that's in kind of its own category, sometimes
17 plaintiffs are at a disadvantage because they don't know
18 what the facts are that support these defenses. And the
19 reason they don't know the facts is that unlike plaintiffs,
20 defendants asserting affirmative defenses don't have to make
21 factual allegations to support that defense.

22 So for resample, the statute of limitation, they
23 don't have to say, oh, you know, this claim accrued on X
24 date and you filed on X date and to give the facts as to why
25 it accrued on X date. So sometimes that puts the plaintiffs

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2 in the dark and one has sympathy for them, though the answer
3 to it may not necessarily be a 30(b)(6) deposition. The
4 answer, in my experience, has usually been a limited
5 contention interrogatory not requiring them to marshal the
6 evidence to support the defense, but to state the factual
7 allegations that they're making if it's one of these
8 situations where the plaintiff literally doesn't know what
9 this defense is and how it applies to this case.

10 So that's normally the better way to solve it than
11 to try to do it through a 30(b)(6) deposition which is
12 really going to be someone who has been spoon-fed
13 information by a lawyer as to why we think the statutes of
14 limitation defense, you know, applies in this case.

15 So with that big picture, tell me what's going on
16 here and what you think the solution is, Mr. Shuster?

17 MR. SHUSTER: I'd like to take a moment to think.

18 THE COURT: Okay. I know I've sprung this on
19 you.

20 MR. SHUSTER: No, no, well, I mean, the main
21 focus here, I don't think these are sort of classic,
22 frankly, affirmative defenses of the type that you
23 described. I think these are various -- there's a lot of
24 factual arguments that are couched as affirmative defenses
25 understandable and a common practice. But we are in the

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dark about what facts defendants believe do or could support those arguments. They --

THE COURT: And if I were you, my fear would be that they were going to ask for a jury instruction on this purported defense.

MR. SHUSTER: Absolutely.

THE COURT: Out of nowhere. So one way that, again, in the past I've used to solve this is to, as part of this contention interrogatory, let them say we do not intend to ask for a jury instruction as to this defense. You know, a classic example is plaintiff fails to state a claim, so that's an easy one.

Well, you don't really need to know why you think that they failed to state a claim because that'll come up in summary judgment, or judgment on the pleadings, whatever it is. You just need to know that there's not going to be some instruction that's requested.

And if they're willing to say it for any particular defense we won't be seeking a jury instruction, does that solve your problem, or some of them, maybe?

MR. SHUSTER: I'd have to go and look at, you know, look at them again carefully. It might. Another problem, another issue we have, frankly, is that some of these affirmative defenses we don't think or we think raise

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2 issues that are just not issues in the case, that are not
3 proper defenses, that are not proper, you know, defenses --

4 THE COURT: Right. It might be enough to just
5 know what the factual contentions are, right?

6 MR. SHUSTER: It might be.

7 THE COURT: And then you can say, you know what,
8 they're never going to be able to prove those factual
9 contentions so what do I care, or whatever your view is.

10 MR. SHUSTER: Right. So but if you look at
11 something like --

12 THE COURT: Let's get practical. Tell me some
13 defenses.

14 MR. SHUSTER: Right. So let's say, you know,
15 they say that they cured breaches or breaches were cured. I
16 don't know of any curers of any breaches.

17 THE COURT: Okay. So let's talk about that one,
18 it's the 6th affirmative defense. I think that that's not
19 truly an affirmative defense. I think what it is a way that
20 they're going to try to say that there is no breach here.
21 They're going to say we cured it.

22 That doesn't mean you're not entitled at some
23 point, and maybe even now, to know what particular reps and
24 warranties were cured. However, it also might not be
25 unreasonable for them to say, you know what, we don't know

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2 yet. And, you know, that's something that's going to come
3 out as we do more discovery work in this case and so forth,
4 in which case, we might put off your ability to find out the
5 answer to that question until, you know, a more opportune
6 moment.

7 MR. SHUSTER: Okay. I mean, we're prepared to
8 proceed with that guideline. And honestly, I don't think
9 that, you know, I don't think there's anything there now. I
10 don't think there's going to be anything there later. But
11 you know how lawyers are. It was said, so I want to see
12 what's behind it.

13 THE COURT: I mean, I think you're entitled to a
14 contention interrogatory at some point. And maybe even now,
15 in which case their answer might be we don't know yet; we'll
16 supplement as necessary. In which you say we want you to
17 list in interrogatory form, not 30(b)(6) form, any instance
18 in which you've cured a breach that's been specifically
19 alleged.

20 By the way, did you allege specific breaches in
21 your complaint?

22 MR. SHUSTER: No, not in the complaint. We
23 noticed a lot of specific breaches.

24 THE COURT: Okay. Right. It's part of your
25 forensic review.

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MR. SHUSTER: Right.

THE COURT: You're entitled to know that information. At what stage, I'm not sure yet, and maybe that's something that we can talk about in a larger context after we go through some more of these. But I absolutely agree you're entitled to know the answer to that. I'm saying this now without having let you spoke, Mr. Woll. Do you think they're never entitled to know it, or just not entitled to know it now, or just not entitled to know it through 30(b)(6) deposition?

MR. WOLL: Your Honor, I think the contention interrogatory is a very practical way to approach this. I think the answer to your question is I'm not saying they're not entitled to know. I think the 30(b)(6) is not the way to go. And in terms of timing, you know, some of the what is, and is in the breach, is going to be determined, I guess, by the expert discovery that they serve.

And if they, you know, identify their breaches through expert discovery and they want to, you know, have us then say did we cure any of these breaches. At that point, that might make sense.

THE COURT: Okay. I mean the thing one doesn't want to happen and I don't think it's likely to happen here, is that your response to which ones you cleared opens up

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some factual issue that is not part of a document production or a deposition that already occurred. It seems very unlikely. Is that fair?

MR. WOLL: No, I think that's right and these --

THE COURT: That's the only downside to waiving to the experts.

MR. WOLL: Right.

THE COURT: Is we don't want to say, oh, gee, if I had known you felt we cured that breach I would've asked witness X about this or I would've asked for this particular document.

MR. WOLL: Right.

THE COURT: The second thing it's not going to happen. I assume the first thing's not going to happen but that's the danger.

MR. WOLL: I think that's fair and, I mean, these, as I think Your Honor indicated, I mean these are, you know, affirmative defenses are put in the answer because, you know, parties get nervous about waiving things.

THE COURT: People seem to do it -- I don't know why -- so then everyone has to do it. Go ahead.

MR. WOLL: No, but so anyway, that would be my suggestion. I think the contention interrogatory makes sense perhaps, you know, after they've identified the

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2 breaches for the cure issue and others that are tied to the
3 breaches. Maybe that's the time we answer that.

4 THE COURT: Is there a point at which you feel
5 you're going to be obligated to identify the breaches?

6 MR. WOLL: Well, we have identified the breaches
7 and breach notices, loan by loan, in considerable detail.
8 So we know there's --

9 THE COURT: Is that subject to change or not?

10 MR. WOLL: It's subject to change. The reality
11 is it'll change modestly because we do have expert re-
12 underwriters who are doing their own reviews of the loans
13 and they're certainly not going to agree foursquare with the
14 forensic, the pre-sued forensic reviews. So there'll be
15 some degree of change but it'll be on the order of single-
16 digit percentages.

17 THE COURT: I mean do you sitting here now know
18 of cures or are you just hoping that by the end of this you
19 have some?

20 MR. WOLL: Yeah, I don't, I don't know whether
21 there was a cure in these cases.

22 THE COURT: All right. So I don't know that it
23 makes any sense to do this now. I think it makes sense to
24 do it as part of the expert phase knowing that the
25 likelihood this is going to raise any actual factual

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2 discovery issue that wasn't anticipated as it first was
3 zero. Is that fair, Mr. Shuster?

4 MR. SHUSTER: Yeah, the only thing I would say is
5 I would not have anticipated that actually any expert would
6 have addressed the matter of cure. Cure is a, you know, is
7 a factual issue of --

8 THE COURT: No, no, but my point is that you're
9 going to be -- it's possible that you will withdraw some of
10 your claims of breaches as part of the expert's review So
11 it might make sense to just know what the full universe is
12 of breaches.

13 MR. WOLL: I think we know what most of the
14 universe is. No, what I -- so, you know, practically what's
15 going on here, they're asserting cures; we look at this, we
16 say this is news to us, right? I want to get someone on
17 their side to --

18 THE COURT: Okay.

19 MR. WOLL: -- give a very general answer that
20 shows they don't have any facts to support it. Then at
21 least I know I don't have to pursue it, you know, in
22 discovery or via my experts. Or I can move to, you know --

23 THE COURT: Okay. I think that's fair. I think
24 that you've given them, you say specific notice of breaches.
25 It's not likely to change by any appreciable way. On the

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other hand, I don't want them to have to do this until we're a little farther along in discovery. So I think maybe, you know, just before the end of the fact discovery period is the time to do these contention interrogatories.

MR. SHUSTER: That's certainly fair. Thank you. So the next one honestly raises --

THE COURT: This is a causation issue.

MR. SHUSTER: Right. And the truth is, in our view, there is no causation issue here. The contract says that if there's a breach that materially and adversely affects the value of the loan or the certificate -- certificate holders' interest they're in, then they either have to cure or repurchase. We don't view that as turning on -- we don't think this is a legitimate issue at all but they do, they're going to raise it.

I do expect them to seek to introduce substantial evidence on this point. It wouldn't shock me if they tried to introduce, in addition to fact evidence expert opinion evidence and all of that. And if they're going to say all of this I think we're entitled to know what's behind it, even though we still reserve as to our contractual and legal argument that none of it is relevant to begin with.

THE COURT: Okay. Now the question is when and how do you get to find out about the contentions on this?

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That's really the question. 30(b)(6) doesn't seem like the right way to do it; an interrogatory makes more sense. And maybe the question once again becomes when. And I think we're going to end up maybe at the same places we did with the sixth affirmative defense. What do you think?

MR. SHUSTER: I think this stuff, they know, they --

THE COURT: They know now.

MR. SHUSTER: Yes, yeah, they dealt with these issues before. They have appointed --

THE COURT: No, but when you say they know -- well, I mean, let me hear from Mr. Woll. Do you know now?

MR. WOLL: Your Honor, no, not with respect to the loans that they're actually going to claim breach on. And let me just add, by the way, that although we're not arguing about whether this defense is valid or not, I just want to point out that the plaintiff, in addition to the specific contractual remedy which we say they're limited to, have argued that beyond that they could be entitled to damages.

And so if anything, we disagree with that but if they get to go beyond the contractual remedy then we would certainly be in causation land.

But I think that the timing of this is again

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2 something that, you know, we'd be willing to address nearer
3 to the end of fact discovery like you propose we --

4 THE COURT: Well he says you know now so tell me
5 why you shouldn't have to answer it now.

6 MR. WOLL: Well, I mean the -- until we see their
7 actual breaches to go through the discussion of which --

8 THE COURT: When you say actual breaches, the
9 ones you have so far you're concerned they're going to
10 radically change when an expert goes through it?

11 MR. WOLL: Well, I mean assuming -- if they're
12 having an independent expert look at this stuff then there
13 could be changes. Maybe they'll, you know, maybe as Mr.
14 Shuster says, they'll be modest changes but I really don't
15 think we should get into a contention interrogatory until
16 we, you know, have some idea of what the breaches are.

17 MR. SHUSTER: Two things: One, on the claims we
18 have that are not purely under the re-purchase protocol as
19 it's described, it's a fairer argument. I don't agree with
20 the argument but it's at least a more plausible argument
21 that they can make that there's some causation issue.

22 But they're making that. I don't agree with it,
23 reserve all my rights. But they're making the argument,
24 they're making the assertion. These are macroeconomic
25 factors the Deutsche Bank has looked at, that Deutsche Bank

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2 has experienced, that Deutsche Bank has commented on
3 internally, externally.

4 We have 4,000 loans, roughly rounded, at issue
5 here. If we have 4,000 completely different loans they'd
6 make the identical arguments. They're not going to make
7 arguments about real estate market crash, economic downturn,
8 and this and that, that get down to a granular level on
9 specific breaches on specific loans.

10 They're going to say that the market crash and all
11 these other factors caused all loans of various categories
12 to go down in value and they have views on that. And that's
13 what I think we're entitled to. That actually is fact
14 discovery and they want to have my experts address that --

15 THE COURT: Fact discovery?

16 MR. SHUSTER: Well to the extent they know what
17 is behind this. To the extent they have a point of view on
18 their side, think I'm entitled to it because I want to --

19 THE COURT: But why -- but what -- this is the
20 thing. I imagined this, and maybe Mr. Woll, you'll tell me
21 otherwise, is that you're not going to conduct any fact
22 discovery on this. What you're going to do is have an
23 expert that talks about all these things. Am I right or am
24 I wrong?

25 MR. WOLL: I think that's right, certainly on the

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macro level I think that's --

THE COURT: What else is there?

MR. WOLL: Well I just wanted to comment. I don't think either of us are talking about on a loan-specific basis. I mean there could be inquiries about, you know, a particular borrower who lost his job or, you know, got sick or something like that. There are other kind of loan-specific causation issues but that's not what we're talking about here. So with that caveat I think on a macro level --

THE COURT: Okay. Yeah, on the macro it seems to me he's going to do an expert and you'll have the time you need to oppose it. Isn't that the better way to do it?

MR. SHUSTER: You know, he may not do an expert except in rebuttal to my affirmative experts. So I may not get an affirmative expert --

THE COURT: What if I promise you a rebuttal to whatever the expert gives on the macro point?

MR. SHUSTER: That would be very helpful and I think that would be fair.

THE COURT: All right. So we can either do it with that he has to give that expert report the same time you give yours or we'll build in a rebuttal period.

MR. SHUSTER: I think it would be fairer if

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2 they're going to address this to have them address it in
3 their affirmative expert reports. They styled it as an
4 affirmative defense. If it is a truly an affirmative
5 defense, right, they would have the burden. They'd have to
6 put in an affirmative --

7 MR. WOLL: I guess by the --

8 THE COURT: It's right there in black and white,
9 isn't it?

10 MR. WOLL: I guess by the same token, Your Honor,
11 plaintiff is going to seek damages in a way that it would be
12 required under applicable law to prove causation, which is
13 normally the plaintiff's burden, then they should put in an
14 affirmative report on their causation argument at the same
15 time.

16 MR. SHUSTER: Lost causation is not an element of
17 any claim that we're asserting.

18 THE COURT: Well let's do one thing at a time.
19 So what we've established is you're going to -- the issues
20 raised by the seventh affirmative defense are going to be
21 part of an expert report. They'll have a chance to rebut
22 it. Our presumption now is that you'll serve it at the time
23 the plaintiff serves their expert reports, though that can
24 be revisited if we feel it's appropriate. But in any event,
25 we would give the plaintiff a chance to rebut it.

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2 MR. SHUSTER: So, thank you, Your Honor. Topic
3 14 which is the (indiscernible) affirmative defense, they
4 say we committed material breaches of the agreements.
5 Again, I truly don't know what they're referring to and I'd
6 like to.

7 THE COURT: Well this is one of these things that
8 I don't feel is an affirmative defense at all but you did
9 put it in there. Are you going to be seeking some jury
10 instruction on this or do you think this is part of their
11 burden or what?

12 MR. WOLL: Your Honor, I think as a general
13 category, certainly one thing that falls into this bucket,
14 is that the trustee had certain prompt notice obligations
15 and there are disagreements about when those kick in. But
16 to the extent the trustee was obligated on the contract to
17 provide prompt notice and failed to do so, that's certainly
18 an example of a material breach.

19 I agree with you, that's an element of the
20 plaintiff's claim. It's not really an affirmative defense.
21 We listed it as belt-and-suspenders, but.

22 THE COURT: Okay. Well so now you're giving me
23 an example of material breach which is helpful. Any others
24 that you know about?

25 MR. WOLL: I'm sure there -- I'm sure there are

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2 others. I'm sure there are many but, yeah, yeah.

3 THE COURT: See, I don't -- this is the kind of
4 thing, again, my only issue is I don't want things to come
5 up that cause people to say, you know what, if I'd known
6 that that was your factual contention I would've taken
7 discovery on that. I would have asked some question of a
8 witness on that.

9 So that's what they need assurance on and I think
10 that, you know, now that we're out of an expert field this
11 may go to an area where they should get a contention
12 interrogatory, you know, earlier in the case. If you know
13 some material breaches now, like what you just said, that
14 you should respond to it and you could supplement later,
15 again, through an interrogatory. What's your view on that?

16 MR. WOLL: I think that's fine, Your Honor,
17 subject to supplementation since we haven't, you know,
18 finished discovery.

19 THE COURT: Okay. This is one you should answer
20 if they serve you a contention interrogatory. And again,
21 you don't have to -- I don't want a contention interrogatory
22 that requires anybody to marshal evidence; it's just to
23 state the factual contentions that support the defense.

24 So if you want to serve that now and see what you
25 get in 30 days that seems to me fair.

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MR. WOLL: Very good.

MR. SHUSTER: So the topic number 15, the intent affirmative defense failed to mitigate minimize their employee damages.

THE COURT: Well this is your -- this certainly is an affirmative defense, as I recall. I mean at least I haven't seen it in this context but generally mitigation is a defendant's burden.

So I think once again, following my paradigm, if they want to serve you a contention interrogatory now that says state your factual contentions that support this, you should be required to answer it, if you have any answers, understanding you could supplement them later.

MR. WOLL: That makes sense to me, Your Honor. Thank you.

THE COURT: Next?

MR. SHUSTER: The next affirmative defense I must say really doesn't sound like an affirmative defense. I mean, it's topic number 16. It's the 11th affirmative defense and it says our claims are barred to the extent any breach does not materially or adversely affect the value of any loan. You know, that's straight out of the contractual language so --

THE COURT: Saying you can't prove your case.

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MR. SHUSTER: Right.

THE COURT: I'm less inclined to require them to explain that, though I would require them to say they're not seeking a jury instruction on it. It would sort of force them to say this is not an affirmative defense and which we're seeking a jury instruction. Either that or they have to give the factual contentions. So if you want to add that now to your list and let them say one or the other, that would be fine with me.

MR. SHUSTER: The one thing that, you know, they're staking out a view, I would like to hear from either a 30(b)(6) witness or by a contention interrogatory what they mean by materially and adversely affect the value of the loan. They may have a factual understanding of that firm, I know they do, and if they can, you know, flush that out in a contention interrogatory I'd like to know what facts they're going to -- the category of the facts, the nature of the facts they're going to try to marshal on that point.

THE COURT: Mr. Woll, are you prepared to answer that? Not now, but in an interrogatory.

MR. WOLL: I think, you know, subject to how Your Honor addressed the other issues, I think we'd be prepared to answer this in an interrogatory subject supplementation.

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I believe we've asked the plaintiff for a similar interrogatory and I apologize. I don't remember whether you've agreed to provide that answer or not. But I assume that if we're serving these types of contention interrogatories on each other then both sides need to respond.

THE COURT: Well maybe. I mean, you're in a little different position because you put in defenses without putting in any factual allegations, unlike the plaintiff who had to bear its soul and state what its factual allegations are. So you're kind of in a different position.

And again, I'm not requiring anyone to marshal evidence at this stage, just to give the factual contentions that support it. Plaintiffs have done that in their complaint so you're not in a parallel position. Just be aware of that.

MR. WOLL: Fair enough, Your Honor. I mean, with respect to the, kind of, the conceptual approach to determine material and adverse affects --

THE COURT: Oh, on that -- this last point, yeah, I'm not quite sure what this is about, but if you guys want to try. If they're making the same -- are they making claims about material and adverse effects? I don't know.

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MR. WOLL: That's part of it. They are alleging that they were material and adverse effects.

THE COURT: Well you guys want to maybe talk to each other at first and see if you want to try contention interrogatories on that, then maybe there's some mutuality.

MR. WOLL: Gotcha. Thank you.

MR. HULTMAN: The one difference is, of course, we flushed that out in our breach notices and in our complaint.

THE COURT: Okay. Well that may be your answer.

MR. SHUSTER: So the next one, topic 17, the 15th affirmative defense asserts that any alleged hard suffered by the plaintiff is the result of the conduct of third parties. Again, I don't think that's a valid affirmative defense --

THE COURT: Sounds kind of like the seventh affirmative defense, except instead of being macro economic forces it's actual entities.

MR. SHUSTER: Right, but I would like to know what third parties and what conduct, at least in general term, could be a defense to the claims here.

THE COURT: Well I think this is one of those that a contention interrogatory which gives you facts as you know them now would be appropriate. This is not going to be

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an expert issue; this is a factual issue.

MR. WOLL: I think that -- I think that's fine,
Your Honor. Thank you.

MR. SHUSTER: And then finally the assumption of
risk defense. I'm not -- again, I question whether it's a
valid affirmative defense. I could --

THE COURT: Legally valid.

MR. SHUSTER: Right.

THE COURT: Not just whether it's affirmative;
whether it applies in any way.

MR. SHUSTER: Correct, whether it can possibly
apply in new circumstances. But to the extent we -- there's
any factual basis for this affirmative defense, I'd like to
know at least, you know, in some way what it is so that I
can address it if necessary.

THE COURT: I think this fits into the previous
category.

MR. WOLL: That's fine, Your Honor.

THE COURT: Okay.

MR. SHUSTER: So that's all the plaintiffs have.

THE COURT: All right. Anything else from your
issues before we go to the defendants?

MR. SHUSTER: No, Your Honor, thank you.

THE COURT: Well, the first one seemed easy

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2 because all you were asking was to talk to the other side.
3 Is it too easy to say, sure, go ahead?

4 MR. WOLL: Maybe it is that easy, Your Honor. I
5 mean, the problem we have is that there's just been such a
6 very small number of documents produced by the plaintiff.
7 And we've tried to approach this in a few different ways in
8 terms of proposing additional custodians asking --

9 THE COURT: Well, the number is not the issue, is
10 it?

11 MR. WOLL: No, up to a point it's not; I totally
12 agree. And maybe there is no issue but I just -- I feel
13 it's incumbent upon me to try to probe this as much as I can
14 and we just haven't gotten much in the way of satisfactory
15 responses.

16 And one of the -- I mean, two things that I guess
17 I would note, and one is we had proposed five different
18 custodians that they add to their lists that they didn't
19 agree to run search terms on.

20 For at least a couple of those custodians or one
21 of them, Doris Wang (phonetic), was over 200 -- there's like
22 270 entries on the privilege log. So those are apparently
23 relevant documents that are being held on privileged
24 grounds. So to tell us Doris Wang wasn't a relevant
25 custodian here, given the paucity of e-mails we've seen,

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2 raises issues in our mind.

3 In fact, there's something like 151 HSBC
4 individuals, non-legal individuals, on their privilege logs.
5 And again, just because somebody's on a privilege log
6 doesn't mean that they're an adequate custodian but we are
7 concerned that we have not tapped into the right custodians
8 and the right search terms to get at the relevant materials.
9 I mean, there are no documents to speak of in terms of
10 evaluation of the securitizations or the mortgages.

11 I think there are going to be some documents
12 produced, and Mr. Shuster will correct me if I'm wrong, in
13 connection with communications with one of the certificate
14 holders. But there's lots of information with respect to
15 communication with other certificate holders that haven't
16 been produced.

17 So I'm just concerned we haven't struck the right
18 custodian or search term balance to get what, you know, my
19 client needs to defend itself.

20 THE COURT: And what do you want me to do? I
21 mean, let me -- you're entitled to get detailed descriptions
22 from the plaintiff as to, you know, why they believe
23 custodians are appropriate and why people appeared on a
24 privilege log but wouldn't have any documents responsive or
25 shouldn't be searched.

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2 So have you sat down and tried to get those
3 answers or not?

4 MR. WOLL: Well, we've -- yes and no. I mean, to
5 be honest with you in terms of going through the privilege
6 log and, you know, all these names I just mentioned, I
7 haven't had that specific conversation with Mr. Shuster and
8 I'm happy to do that.

9 We did propose some additional custodians and then
10 they said no. And as I said, at least one them has --

11 THE COURT: And gave you good reasons or not?

12 MR. WOLL: Well, they said they weren't involved
13 or they were low-level employees. But Ms. Wang, as I said,
14 has many entries on the privilege log which indicates some
15 level of relevant involvement, potentially. So I know we
16 presented Your Honor with not a very clear, you know,
17 situation in terms of ordering something. But maybe if it's
18 just to get a commitment from the plaintiffs that they will
19 work with us on this, because as I said, the paucity of e-
20 mails is very concerning to us.

21 MR. SHUSTER: So I have to say I don't think we
22 needed the Court's intervention for us to commit to work
23 with them. We've been prepared to meet and confer on this
24 issue and have met and conferred on this issue several
25 times.

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2 We received an e-mail from Mr. Woll's team by just
3 within the last day or so, asking us if we've completed our
4 production. And we told them that we're going to produce
5 these additional sort of Amherst-related documents, I guess,
6 because that is consistent with rulings and observations
7 Your Honor made at the hearing on the subpoena to Amherst
8 and agreements they've reached with Amherst counsel.

9 And beyond that, we've identified fewer than 20
10 additional documents on our privilege log or otherwise that
11 we intend to produce. There may -- you know, a lot of these
12 people whose names area on the privilege log, it's because
13 they were on a broad circulation of documents.

14 But we have done a lot of digging, of sitting
15 down, of interviewing custodians to make sure that we're
16 identifying the custodians who have relevant materials.

17 The trustee here -- and this is just a fact. It's
18 a fact under the documents and it serves a really, purely
19 administrative function. The trustee gets paid very little
20 money every year and just -- it just had a completely
21 different role in this transaction than Deutsche Bank did.

22 I'm, you know, even the witnesses, the custodians
23 who did produce documents and who Deutsche Bank is going to
24 depose, are going to be disappointing deponents for them
25 because they just don't have a lot of knowledge that is

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2 going to be useful or relevant.

3 But we've been prepared to meet and confer. We
4 have met and conferred. We're happy to do it again and I
5 don't think there ought to be any suggestion that we're in
6 any way derelict in our discovery obligations.

7 THE COURT: Okay. Well, the parties have an
8 obligation, obviously, to do a document production and to
9 give responsive documents, and to take the reasonable steps
10 needed to produce them. Each side should be discussing with
11 other what they're doing to do that. That should be out in
12 the open and not a secret.

13 Obviously if it comes to that, you can depose
14 people about where documents are kept, and who knows what.
15 That's the natural check on this, Mr. Woll. You're going to
16 be deposing some of these people. If it turns out that
17 there is documents they recall, or remember, or interactions
18 they had that weren't subject to the production, there's
19 going to be, you know, big trouble for the plaintiffs. So I
20 have no reason to believe that they're not going to do all
21 they need to do to make sure that you get the responsive
22 documents.

23 But as I say, you're entitled to question them in
24 that. I encourage you to discuss it further and if you
25 think that there is some further step that should be taken

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2 that they're not, give me specifics and present it to me,
3 okay?

4 MR. WOLL: Thank you, Your Honor, appreciate
5 that. I think the last issue are interrogatories, Your
6 Honor.

7 THE COURT: Okay.

8 MR. WOLL: And we had -- we'd raised plaintiff's
9 refusal to answer three interrogatories -- interrogatory 6
10 which asks them to quantify the damages that they're
11 seeking; interrogatory 7 which asks them to identify the
12 purchase price, which is a defined term in the contract
13 which is relevant to the damages they're seeking; and the
14 third interrogatory asks them to identify the status of the
15 mortgage loans that they're suing at.

16 The response on the first two interrogatories,
17 which are essentially damages interrogatories, has been that
18 the plaintiff will address damages through its experts and
19 doesn't have to provide an interrogatory response at this
20 point with respect to its damages.

21 We think that that's incorrect and we've cited
22 cases to the effect that just because experts are going to
23 deal with damages doesn't mean that a party doesn't have to
24 answer interrogatories spelling out a --

25 THE COURT: What are you concerned about? What

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is this interrogatory -- I'm not saying you're not entitled to it, but I'd like to talk practicalities, because there were different factual situations in these other cases.

MR. WOLL: Sure, mm-hmm.

THE COURT: What is it you're concerned about that if you had to wait until you got an expert that specifically said with damage amounts, explain to me what's the prejudice to you?

MR. WOLL: Well, Your Honor, I think that knowing, you know, the numbers are important obviously, but more than the numbers I think it's the way that the plaintiff arrives at the numbers. And so as we said, the purchase price is a defined term and of -- under the agreement and how they're deriving the --

THE COURT: I'm sorry. And just since I'm ignorant about this what does purchase price mean in this context?

MR. WOLL: So the purchase price is part of what needs to be paid by DBSP in connection with the repurchase of a loan essentially.

THE COURT: When it originally --

MR. WOLL: No, in connection with a repurchase demand so --

THE COURT: Oh, oh, when the plaintiff says to

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2 DBSP you need to repurchase these loans because they're bad,
3 is that what you're talking about?

4 MR. WOLL: Exactly. Then the purchase price goes
5 into that contractual calculation of --

6 THE COURT: The purchase price is what price
7 exactly? The price that you do what with?

8 MR. WOLL: Well it's a defined term which I can't
9 recite off the top of my head. But it's essentially a
10 component of what DBSP would have to pay to repurchase the
11 loan, so it's --

12 THE COURT: Pay to whom?

13 MR. WOLL: To the trustee --

14 THE COURT: To HSBC.

15 MR. WOLL: Right, yeah.

16 THE COURT: The plaintiff here.

17 MR. WOLL: Right. So it's a component of their
18 damages. And the manner in which they calculate those
19 damages under the contract is important to --

20 THE COURT: I thought what you were getting at,
21 and I was going to agree with you, is that maybe you don't
22 need to know the exact numbers, but you need to know the
23 categories, as it were, damages.

24 So if you know the purchase price is part of it
25 and it's apparently a defined term, aren't you at this point

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2 essentially asking for the numbers? What more do you need?

3 MR. WOLL: Well I think that maybe disputes as to
4 how purchase price is calculated and I think there are also
5 additional damages that they are claiming, which we talked a
6 little bit about before in my context of causation. So it
7 is for the most part about how they are deriving the
8 numbers. We think they should give us the numbers too. But
9 knowing how they are calculating their damages or going to
10 allege damages could affect discovery, could affect, you
11 know, settlement discussions. We think it's just something
12 that, you know, subject to supplementation they should be
13 able to tell us now.

14 THE COURT: All right. I mean can you give -- I
15 gather the thing you can't do is give numbers. But can you
16 give, sort of categories or some indication of calculation
17 of damages now?

18 MR. SHUSTER: We could probably identify elements
19 of damages but we don't have -- we literally do not have
20 numbers. Elements of damages, I don't think frankly how
21 useful it will be, but.

22 THE COURT: That's the problem. Why don't you
23 take a crack at it? You know, we do have this local rule
24 that has this concept that defendant should be put on notice
25 of categories, I think is the rule, the language I can't

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remember, of damages.

I'd like to do something that does that for him. And then if you need to say we cannot do the numbers until our expert gives us numbers, say that. And then if you think you're entitled to more come back to me. Let's see what they come up with.

MR. WOLL: Okay. Fair enough, Your Honor. And then the third interrogatory had to do with the status of the loans. I mean the trustee has information about the performance of the loans, whether they're in liquidation or not and --

THE COURT: Isn't that coming up in discovery or not?

MR. WOLL: Well it is part of discovery. That's why we're --

THE COURT: No, but I just assume there was some very obvious document for each loan that says what the status is. And you're getting it and it would be a complete waste of time for them to repeat it in an interrogatory answer. Am I wrong on that?

MR. WOLL: Well we may get documents that have that information and I guess if they do have a document that shows that and they want to --

THE COURT: That organizes it. Do you have

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2 happen -- is it a burden to you to organize that or have you
3 not already done it?

4 MR. SHUSTER: So the trustee actually does not
5 monitor the status of the loans and maintain information.
6 Reports are prepared by the servicer. Either the servicer
7 or the master servicer, under the pooling and services
8 agreement, those reports are available on a website that I'm
9 quite confident Deutsche Bank has.

10 THE COURT: That's the only place you could get
11 this from?

12 MR. SHUSTER: That's where we would go.

13 THE COURT: All right. Well it's a waste of time
14 to make them do this so feel free to look at that.

15 MR. SHUSTER: Okay.

16 THE COURT: Anything else from the defendant?

17 MR. WOLL: I believe that was it, Your Honor.

18 THE COURT: Okay. So the plan now is that at
19 some point in the near future you're going to propose a
20 schedule. What date would you like me to give you to submit
21 that to me?

22 MR. SHUSTER: So the only issue I have with
23 fixing a schedule is the disputer over privileged documents
24 is actually meaningful. It's a large volume of material and
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THE COURT: Are we going to be holding up depositions while we do this?

MR. SHUSTER: You know, I don't know yet what to do about it. We've held up depositions on -- we've held up depositions pending the defendant's production of these additional materials that we dealt with in issue 1. And so those are supposed to be produced by July 31. But a lot of those materials, I think, they're claiming privilege over or they've redacted. So I honestly wasn't anticipating that we would have a briefing schedule that extends out beyond that date and --

THE COURT: I hope you don't blame me for this.

MR. SHUSTER: No, no, but you know, until we know -- which I'm not asking -- you know, until we have a ruling from the Court and then there is a production, if assuming the best for us pursuant to that ruling, you know, it feels to me like we probably won't get a ruling. And then a production until around October 1 or, you know, best-case, I mean it's submitted August 24th.

THE COURT: I think a ruling October 1 is best-case, but.

MR. SHUSTER: So I don't know where that would be, you know, honestly, I don't know where that leaves us on whether we think we can do any depositions before that and

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2 do a schedule, just candidly. We can think about it. If we
3 could have a couple of days to think about it, maybe to talk
4 about it, and then send Your Honor a letter and say we
5 either are or aren't able to propose.

6 THE COURT: I'm not saying you should propose one
7 now. My plan had been to have you propose one to me later.
8 But maybe what you're saying is you haven't even thought
9 about whether you should do depositions before the ruling on
10 the -- before the ruling on the privilege.

11 MR. SHUSTER: Right. In light of the schedule
12 today on the briefing I'd at least like to go and think
13 about it. Why don't we say that we'll come back to the
14 Court within no later than two days and address the
15 scheduling issue together, one way or the other.

16 THE COURT: I'm not in a rush, so.

17 MR. SHUSTER: Okay. So --

18 THE COURT: Is there a cutoff right now?

19 MR. WOLL: September --

20 MR. SHUSTER: There is; it's September 15th.

21 THE COURT: Okay. So before then so --

22 MR. SHUSTER: Okay. So we'll send something to
23 the Court before then and thank you, Your Honor.

24 THE COURT: Okay. Anything else, Mr. Woll?

25 MR. WOLL: No, that's it, Your Honor, thank you

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very much.

THE COURT: Thank you.

(Whereupon the matter is adjourned.)

C E R T I F I C A T E

I, Carole Ludwig, certify that the foregoing transcript of proceedings in the United States District Court, Southern District of New York, Ace Securities Corp. Home Equity Loan Trust, Series 2007-HD3 v. DB Structured Products, Inc., 13cv1869 was prepared using digital electronic transcription equipment and is a true and accurate record of the proceedings.

Signature_____

Date: July 13, 2015